



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

July 5, 1995

Honorable Pete P. Gallego
Chair
Committee on General Investigating
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 95-045

Re: Whether a microwave oven in
commercial food vending service must
be surveyed every six months and
related questions (ID# 31186)

Dear Representative Gallego:

You pose several questions concerning the regulation of microwave ovens used in commercial food vending service. Your questions require an explication of chapter 401 of the Health and Safety Code and title 25 of the Texas Administrative Code, chapter 289, incorporating a document entitled "Texas Regulations for the Control of Radio-Frequency Electromagnetic Radiation." *See* 2 Tex. Reg. 3668 (1977), *amended by* 9 Tex. Reg. 1271 (1984). We will begin by briefly describing the relevant statutory and regulatory provisions.

The Texas Radiation Control Act (the "act"), chapter 401 of the Health and Safety Code, *see* Health & Safety Code § 401.0005, is designed to, among other things, "ensure effective regulation of sources of radiation for protection of the occupational and public health and safety and the environment." *Id.* § 401.002(1). To this end, the act authorizes the Texas Board of Health (the "board") to promulgate rules relating to the control of sources of radiation.¹ *Id.* § 401.051; *see id.* § 401.003(2) (defining "board"). Additionally, the act requires the Texas Department of Health (the "department") to direct an owner or user of a source of radiation to license or register the source, *see id.* §§ 401.101, .103, and to maintain various records relating to the use of the source of radiation, *id.* § 401.057(a)(1). The board may, by rule, exempt certain persons from either of these two mandates. *See id.* §§ 401.057(b), .106. Finally, the act provides for enforcement of the act through inspections, legal actions, and the assessment of penalties. *See id.* §§ 401.063(a), .342(a), .381 - .384.

Microwave ovens² are subject to the act as electronic products. Section 401.003(9) defines "electronic product" as "a manufactured product or device or

¹A "source of radiation" is "radioactive material or a device or equipment that emits or is capable of producing radiation intentionally or incidentally." Health & Safety Code § 401.003(21).

²A microwave is "a comparatively short electromagnetic wave," especially "one between about one millimeter and one meter in wavelength." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 751 (9th

component part of a manufactured product or device that has an electronic circuit that during operation can generate or emit a physical field of radiation." "Radiation" is defined to include "stimulated emission of radiation from an electronic device to energy density levels that could reasonably cause bodily harm." *Id.* § 401.003(16)(B).

Pursuant to the authority granted it in the statutory predecessor to section 401.051 of the act, the board has promulgated title 25 of the Texas Administrative Code, section 289.6,³ pertaining to the control of radio-frequency electromagnetic radiation. *See* 2 Tex. Reg. 3668 (1977). In section 289.6(a) the department "adopts by reference the regulations contained in the department's document titled, 'Texas Regulations for the Control of Radio-Frequency Electromagnetic Radiation,' as amended in April 1984."

The Texas Regulations for the Control of Radio-Frequency Electromagnetic Radiation (the "regulations") define "microwave oven" as "a device designed to heat, cook, or dry food through the application of electromagnetic energy at frequencies assigned by the Federal Communications Commission in the normal ISM heating bands ranging from 890 megahertz to 6,000 megahertz."⁴ 2 Tex. Reg. 3668, at 3670 para. 80.2. The term is expressly limited to microwave ovens manufactured for use in homes, restaurants, food vending or service establishments, or intrastate or interstate carriers and similar facilities. *Id.*

Part 90 of the regulations establishes standards for protection against radio-frequency electromagnetic radiation. Part 90 applies only to an electronic product that produces "an accessible emission level" exceeding one milliwatt per square centimeter at any point five centimeters or more from any point on the oven's external surface, if the level is measured prior to the purchaser's acquisition, or five milliwatts per square centimeter at any point five centimeters or more from the external surface of the oven, if the level is measured after acquisition. *Id.* at 3671 para. 90.1(a); *see also id.* at 3673 table 90-1, at 3674. For the sake of brevity, we will refer to a microwave oven that produces an accessible emission level exceeding the amounts specified as a microwave oven subject to part 90.

(footnote continued)

ed. 1990). A microwave oven is an "oven in which food is cooked by the heat produced as a result of microwave penetration of the food." *Id.*

³In her letter to this office originally seeking answers to the questions you have reiterated, your predecessor as chair of the House Committee on General Investigating cited title 25 of the Texas Administrative Code, section 289.81. Section 289.81 pertains to *in situ* uranium mining. We do not understand you to ask about uranium mining; rather, we believe your predecessor intended to cite section 289.6, which applies to microwave ovens.

⁴Throughout the remainder of this opinion, we will use the term "microwave oven" consistently with the regulations' definition of the term.

A microwave oven subject to part 90 may be operated only in a controlled area, marked with proper warning signs. *Id.* at 3671 paras. 90.3(a), (b), 3672 para. 90.4. Additionally, a user of a microwave oven subject to part 90 used in commercial food vending service must survey the oven every six months to ensure that the oven complies with paragraph 90.9(a)(1) of the regulations. *Id.* at 3672 para. 90.5. For purposes of the regulations, "commercial food vending service" is "the use of any self-service device offered for public use which heats or dispenses servings of food or beverage either in bulk or in packages." *Id.* at 3670 para. 80.2.

Each six-month survey must ascertain, in part, that the oven is properly labeled with warning signs and has functioning hazard warning devices and safety interlocks.⁵ *Id.* The user must retain written records of the surveys and make them available to the department upon request. *Id.* at 3672 para. 90.6; *see also id.* at 3670 para. 80.2 (defining "agency").

Whereas other paragraphs of part 90 apply generally to electronic products producing an accessible emission level exceeding the levels specified in table 90-1 of the regulations, paragraph 90.9 provides cumulative requirements applicable only to microwave ovens subject to part 90. Paragraph 90.9(a) articulates power density and safety interlock standards applicable to any microwave oven subject to part 90. *Id.* at 3673 para. 90.9(a). Subparagraph (b) sets sanitation standards applicable only to microwave ovens subject to part 90 and in commercial food vending service. *Id.* Subparagraph (c) relates to the repair of all microwave ovens subject to part 90. *Id.*

Finally, the regulations require that, unless otherwise exempted, all radio-frequency electromagnetic radiation products or installations in the frequency range of ten megahertz through 100 gigahertz must be registered with the department. *Id.* at 3675 para. 100.2. The department has specifically exempted from the registration requirement, among other products and installations, installations of the federal government, its departments and agencies, *see id.* at 3675 para. 100.3, and "[m]icrowave ovens in compliance with paragraph 90.9(a)(1)," *see id.* at 3676 para. 100.4(c). A representative of the Department of Health has informed us that paragraph 100.4(c) exempts from the registration requirement all microwave ovens except those in commercial food vending service. *See also id.* at 3669 table.

You first ask that we set out the Texas laws and regulations applicable to commercial microwave ovens in the state. As we have suggested, the act applies to microwave ovens generally, including microwave ovens used in a commercial setting. The act itself sets few requirements with which a user or owner of a microwave oven must comply, but authorizes the board or the department to enact regulations and to ensure

⁵The term "safety interlock" denotes "a device associated with the protective housing or enclosure of [a radio-frequency electromagnetic radiation] product to prevent human access to excessive radiation under conditions specified in" the regulation. 2 Tex. Reg. 3668, 3670 para. 80.2.

compliance with the regulations. *See, e.g.,* Health & Safety Code §§ 401.051, .057, .063, .103(a). Title 25 of the Texas Administrative Code, section 289.6 also applies to microwave ovens generally, but it sets no standards separate and apart from the regulations, which it incorporates. The regulations articulate substantive standards applicable to microwave ovens generally and additional standards and requirements with which microwave ovens in commercial food vending service must comply. A microwave oven subject to part 90 and used in a commercial setting must comply with the regulations' general standards, and if the microwave oven is in commercial food vending service, it also must comply with the standards and requirements specific to microwave ovens in commercial food vending service.

One of your questions asks more pointedly about the relationship between Health and Safety Code section 401.003; title 25 of the Texas Administrative Code, section 289.6; and the regulations. Specifically, you ask whether the first two supersede the latter. Section 401.003 of the Health and Safety Code simply defines terms, including "electronic product," for purposes of the act. We assume you intend to cite the whole of chapter 401.

As we have explained above, the act, chapter 401, does not in itself set definite standards with which the owner or user of a microwave oven must comply. Rather, it authorizes or requires the board to promulgate rules relating to the control of sources of radiation, *see* Health & Safety Code § 401.051, to license or register sources of radiation, *see id.* § 401.101, and to exempt certain sources of radiation from licensing or registration "if the board finds that the exemption . . . will not constitute a significant risk to the public health and safety and the environment," *see id.* § 401.106.

In addition, title 25 of the Texas Administrative Code, section 289.6 imposes no requirements on microwave ovens separate and apart from the regulations. Rather, section 289.6 incorporates the regulations by reference. Thus, the regulations do not supersede either chapter 401 of the Health and Safety Code or title 25 of the Texas Administrative Code, section 289.6. The regulations, incorporated into title 25 of the Texas Administrative Code, section 289.6, implement the legislative directives expressed in chapter 401 of the Health and Safety Code.

You ask whether the regulations apply to a microwave oven used in a commercial setting if the oven is operated by a city, a county, the state, or the federal government. Pursuant to paragraph 100.3, the regulations do not apply to installations of the departments and agencies of the United States.⁶ However, we find nothing in the

⁶Paragraph 80.2 of the regulations defines "installation" as follows:

any location where one or more radio frequency electromagnetic radiation products are used or operated. The confines of any installation shall be designated by the owner of such installation.

regulations that exempts a microwave oven if the oven is an installation of a city, a county, or state. Of course, to be subject to part 90 of the regulations, the microwave oven must produce an accessible emission level exceeding, if measured prior to acquisition of the microwave oven, one milliwatt per square centimeter at any point five centimeters or more from any external surface of the oven, or if measured after acquisition, five milliwatts per square centimeter at any point five centimeters or more from the external surface of the oven. In addition, a microwave oven in commercial food vending service that is an installation of a city, county, or state must comply with those standards and requirements in the regulations specifically applicable to microwave ovens in commercial food vending service.

You ask whether the regulations apply to all commercial business operations of microwave ovens, and you particularly inquire about a microwave oven provided in a hotel, motel, or apartment unit. As we have indicated, except for the survey and sanitation requirements, every microwave oven subject to part 90 must comply with the requirements set forth in part 90. A microwave oven subject to part 90 that is in commercial food vending service must be surveyed every six months, in accordance with paragraph 90.5(e), and registered pursuant to part 100 of the regulations.

As we have suggested above, the regulations define "commercial food vending service" to include a self-service microwave oven offered for public use that heats or dispenses servings of food or beverages. 2 Tex. Reg. 3668, 3670 para. 80.2. On its face the term "commercial food vending service" denotes a microwave oven associated with the sale of food, such as a microwave oven provided by the retailer. Pertinent to your question, a microwave oven is in commercial food vending service only if it is for *public use*. In our opinion, the rule is designed to apply to a self-service microwave oven such as one that is provided with vending machines, in a cafeteria, or in a convenience store. Such microwaves are available to any member of the public who desires to purchase food for sale and to use the oven to warm the purchased food.

Generally, a microwave oven installed in a hotel or motel room is not provided in association with the sale of food or beverages, either in the room or elsewhere in the hotel or motel, that need to be heated. Consequently, we do not believe a such a microwave oven is in commercial food vending service. Additionally, a microwave oven provided in an apartment is not for the use of the general public and thus is not a microwave oven in commercial food vending service. A microwave oven installed in a hotel, motel, or apartment unit must comply with the standards applicable to microwave ovens generally, of course, unless the microwave oven is not subject to part 90.

You ask why some businesses are not covered. Applicability of the regulations is not premised on the type of business in which the microwave oven is installed, but rather

(footnote continued)

We do not here consider what an installation "of the departments and agencies of the government of the United States" is. See 2 Tex. Reg. at 3668, 3675 para. 100.3.

initially on the microwave oven's accessible emission levels and then on the way in which the microwave oven is used. Any microwave oven subject to part 90 must comply with the standards articulated in part 90. Any microwave oven in commercial food vending service must comply with the survey, record-keeping, sanitation, and registration requirements articulated in parts 90 and 100 of the regulations. While we did not locate any written regulatory history illuminating the reasons the board chose to subject microwave ovens in commercial food vending service to more rigorous standards and requirements, we believe the distinction may be related to the amount of radiation leaked from a microwave oven in commercial food vending service as compared to other microwave ovens and the fact that members of the public may use a microwave oven in commercial food vending service.

You also ask whether a microwave oven in commercial food vending service must be surveyed every six months and whether such a microwave oven must have the warning stickers provided in paragraph 90.5 and illustrated in figure 90-1 of the regulations. Paragraph 90.5(e) clearly mandates that the user⁷ of a microwave oven subject to part 90 and in commercial food vending service must survey the microwave oven every six months. Any microwave oven subject to part 90, including such a microwave in commercial food vending service, must comply with the caution signs, symbols, labels, and posting requirements set forth in paragraph 90.4. The requirements include conspicuously posting a warning label that is "readily visible to individuals entering the installation and to individuals in the installation." *Id.* at 3672 para. 90.4(b); *see also id.* para. 90.4(c).

Finally, you ask whether the department has the duty of enforcing its own rules. The act authorizes the department or a representative of the department to inspect any nonfederal premises on which an electronic product is located to determine whether the owner or user complies with the act and the department's rules, licenses, registrations, and orders issued pursuant to chapter 401. Health & Safety Code § 401.063. The department may request the attorney general to institute a legal action if, in the judgment of the department, a violation of the act has occurred or is about to occur. *Id.* § 401.342. The department also may assess a civil administrative penalty, not to exceed \$10,000 per day, against a person who violates the act. *Id.* § 401.384. General civil penalties and general criminal penalties also are available against a person who violates the act. *See id.* §§ 401.381, .382.

⁷The regulations do not define the term "user."

S U M M A R Y

Generally, chapter 401 of the Health and Safety Code, title 25 of the Texas Administrative Code, and the Texas Regulations for the Control of Radio-Frequency Electromagnetic Radiation (the "regulations"), see 2 Tex. Reg. 3668 (1977) (Dep't of Health), apply to a microwave oven used in commercial food vending service. The regulations do not supersede either chapter 401 of the Health and Safety Code or title 25, Texas Administrative Code, section 289.6. The regulations, incorporated into title 25 of the Texas Administrative Code, section 289.6, implement the legislative directives expressed in chapter 401 of the Health and Safety Code.

The regulations do not apply to a microwave oven in commercial food vending service if the oven is an installation of a department or agency of the United States. On the other hand, the regulations do not exempt a microwave oven in commercial food vending service if the oven is an installation of a city, a county, or the state. A microwave oven in commercial food vending service that is an installation of a city, county, or the state also is subject to those regulations specifically applicable to microwave ovens in commercial food vending service.

Except for the survey and sanitation requirements, all microwave ovens that exceed the accessible emission levels specified in table 90-1 of the regulations must comply with the standards articulated in part 90 of the regulations. Only such a microwave oven in commercial food vending service must be surveyed every six months, in accordance with paragraph 90.5(e). The term "commercial food vending service" denotes a microwave oven associated with the sale of food, such as a microwave oven provided by the retailer. Furthermore, a microwave oven is in commercial food vending service only if it is for *public use*.

Generally, a microwave oven installed in a hotel or motel room is not provided in association with the sale of food or beverages, either in the room or elsewhere in the hotel or motel, that need to be heated; therefore, such a microwave oven generally is not in commercial food vending service. Additionally, a microwave oven provided in an apartment is not for the use of the general public and thus is not a microwave oven in commercial food vending service. While a microwave oven installed in a hotel, motel, or apartment unit ordinarily is not subject to those regulations specific to microwave ovens in commercial food vending service, it is subject to the


standards applicable to microwave ovens generally, unless the microwave oven is not subject to part 90.

Applicability of the regulations is not premised on the type of business in which the microwave oven is installed, but rather initially on the microwave oven's accessible emission levels and then on the way in which the microwave oven is used.

Pursuant to paragraph 90.5(e) of the regulations, the user of a microwave oven that produces an accessible emission level exceeding the levels listed in table 90-1 of the regulations and that is used in commercial food vending service must survey the microwave oven every six months. Any microwave oven that produces an accessible emission level exceeding the same levels, including such a microwave in a commercial setting or commercial food vending service, must comply with the caution signs, symbols, labels, and posting requirements set forth in paragraph 90.4.

Section 401.063 of the Health and Safety Code authorizes the Department of Health to inspect any nonfederal premises to ascertain whether a user of a microwave oven is in compliance with chapter 401 of the Health and Safety Code or the department's rules, licenses, registrations, and orders issued pursuant to chapter 401.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Kimberly K. Oltrogge", with a stylized flourish at the end.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee